Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
Lifeline and Link Up	)	WC Docket No. 03-109
Universal Service Contribution Methodology	)	WC Docket No. 06-122
Numbering Resource Optimization	)	CC Docket No. 99-200
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
Intercarrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68
IP-Enabled Services	)	WC Docket No. 04-36

Comments of The Nebraska Rural Independent Companies

THE NEBRASKA RURAL
INDEPENDENT COMPANIES

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Dated: November 26, 2008.

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SUMMARY

The Nebraska Rural Independent Telephone Companies (hereinafter the "Nebraska Companies") appreciate the opportunity to submit these comments regarding these critical issues and the action taken by the Commissioners that allows submission of comments in these dockets. The Nebraska Companies provide comment in response to the questions raised in the FNPRM. The Nebraska Companies urge the Commission to reject the Proposed Orders attached to the FNPRM, and recommend that the Commission take the following actions to maintain certainty and stability in the intercarrier compensation system without risking the long-term viability of universal service on which rural carriers and their subscribers depend:

1. The Commission should retain the existing TELRIC Plus standard in accordance with Section 252(d) of the Act to set a single rate per operating company.

2. The Commission should not designate the input parameters in order to predetermine the reciprocal compensation rate outcome.

3. The Commission should not place Section 251(g) access service into the realm of the reciprocal compensation framework of Section 251(b)(5) as long as there are long distance carriers that need access to local exchange carriers' networks to provide long distance services.

4. The Commission should not place Section 251(g) access service into the realm of the reciprocal compensation framework of Section 251(b)(5) as it complicates carriers' financial responsibilities.

5. The Commission should seek further comment on the AT&T and Verizon "Edge Plan" given the lack of specificity provided in the Proposed Orders.

6. Prior to taking any further actions on access rate reduction, the Commission should determine whether reduction of intrastate access levels to interstate access levels has reduced or eliminated arbitrage opportunities and investigate the effect of unifying terminating access rates in the universal service system.

7. The Commission should conclude that IP/PSTN traffic is a telecommunications service, as defined in the Act, and is subject to assessment of access and reciprocal compensation rates, as appropriate. Any finding to the contrary would put the entire intercarrier compensation and universal service systems at risk.

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Comments of The Nebraska Rural Independent Companies

I. Introduction

The Nebraska Rural Independent Telephone Companies ("Nebraska Companies")[1] hereby submit these comments in the above-captioned proceeding. On November 5, 2008, the Federal Communications Commission ("Commission") released an Order on Remand and

[1] Companies submitting these collective comments include: Arlington Telephone Company, The Blair Telephone Company, Cambridge Telephone Company, Clarks Telecommunications Co., Eastern Nebraska Telephone Company, Great Plains Communications, Inc., Hartington Telecommunications Co., Inc., Hershey Cooperative Telephone Co., K. & M. Telephone Company, Inc., The Nebraska Central Telephone Company, Northeast Nebraska Telephone Company, Rock County Telephone Company, Stanton Telecom Inc., and Three River Telco.

Report and Order and Further Notice of Proposed Rulemaking (the "FNPRM") seeking comment on three specific Proposed Orders. The first, attached as Appendix A, is the Chairman's Proposed Draft Order circulated to the Commission on October 15, 2008, which was placed on the Commission's agenda for a vote on November 4, 2008. Subsequently, this item was removed from the agenda on November 3, 2008.[2] The second, attached as Appendix B, is a Narrow Universal Service Reform Proposed Order circulated to the Commission on October 31, 2008. The third, attached as Appendix C, is a draft Alternative Proposed Order first circulated by the Chairman on the evening of November 5, 2008. Appendix C incorporates changes proposed in the *ex parte* presentations which were attached to the FNPRM, as Appendix D. As noted by the Commission, members of the industry, Congress, and the general public have urged the Commission to seek comment on Appendices A, B and C (collectively referred to herein as the "Proposed Orders"). The Nebraska Companies appreciate the action taken by the majority of the Commissioners in seeking comments, and among the issues, we focus on are those specifically raised by these Commissioners.

The Nebraska Companies also provide comment in response to the questions raised in Paragraph 41 of the FNPRM. Specifically, the Commission sought comment on whether the additional cost standard utilized under Section 252(d)(2) of the Telecommunications Act of 1996 ("Act") should be: (i) the existing TELRIC standard; or (ii) the incremental cost standard described in the draft order. Second, should the terminating rate for all Section 251(b)(5) traffic be set as: (i) a single, statewide rate; or (ii) a single rate per operating company? In addition, The Nebraska Companies comment on the Commission's legal authority under Section 252 of the Act to prescribe a pricing mechanism and whether this authority extends to constraining input

[2] *See* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-286532A1.pdf.

parameters which, in effect, determine the rate for Section 251(b)(5) traffic.

Further, the Nebraska Companies comment on the language in the Proposed Orders that seeks to impose a modified interconnection structure for Section 251(b)(5) traffic onto all telecommunications traffic at the end of the transition period. (*See,* Appendix A, Para. 190; Appendix C, Para. 184) According to the Proposed Orders, the scope of Section 251(b)(5) is not limited geographically ("local," "intrastate," or "interstate") or to particular services ("telephone exchange service,"[3] "telephone toll service,"[4] or "exchange access"[5]). (*See,* Appendix A, Para. 218; Appendix C, Para. 213) The Nebraska Companies submit that both Proposed Orders fail to sufficiently detail how the access regime grandfathered in Section 251(g), a regime established for the exchange of long distance traffic, fits within the traffic exchange rules and intercarrier compensation regime of Section 251(b)(5), which was established to open incumbent local exchange carriers' local markets to competition.

Finally, the Nebraska Companies comment on the unification of rates proposed in the Proposed Orders, as well as, on the inadvisability of classifying IP/PSTN traffic as an "information service."

II. There is No Valid Policy or Economic Rationale that Justifies Moving Away from the Commission's Current Interpretation of the Additional Cost Standard in Section 252(d) of the Act

The Nebraska Companies submit that the existing TELRIC standard must be retained and continued to be applied to traffic that is currently subject to Section 251(b)(5) (local LEC to LEC traffic and intraMTA CMRS-LEC traffic), as the Commission has not offered valid policy or

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[3] 47 U.S.C. § 153(47).
[4] *Id.* at § 153(48).
[5] *Id.* at § 153(16).

economic rationale that would justify deviating from the Commission's current interpretation of the additional cost standard in Section 252.

First and foremost, the existing record at the Commission for fundamental transformation from the current pricing standard is inadequate to warrant such a drastic modification. In particular, the methodology for computing the incremental costs for a multi-product company, as proposed in Paragraph 248 of Appendix A and Paragraph 243 of Appendix C, only differs from the current TELRIC plus a reasonable allocation of common cost ("TELRIC Plus") standard in that the output in question is redefined. The new methodology narrows down the amount of allocation to call termination cost only, which is a subset of the currently used incremental cost of the output of the switch and transport facilities.[6] As a result, there is no provision for the allocation of common costs, thereby resulting in what would be rates set at near zero.

Further, the methodology proposed by the Chairman is not consistent with sound economic theory. Economic theory does not justify a zero allocation of common costs to any output price. One could make a short-run argument that common costs are sunk costs, and therefore, should not be applied to the price of any output. In the long run, however, these common costs are variable and must be reflected in pricing for an industry to survive. The Chairman claims to maintain the use of the long-run standard in his proposed reiteration of the additional cost standard; however, the Chairman's methodology appears to be more of a short-run approach.[7] The new methodology contained in the Proposed Orders confuses the issues between short-run variable costs and long-run costs, given that the latter must include variable and fixed costs. In the long run, all of the outputs of a rural LEC, including access, should contribute to covering fixed costs.

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[6] *See* FNPRM, Appendix A, Para. 236; Appendix C, Para. 231.
[7] *See* Appendix A, Para. 245; Appendix C, Para 240.

As a result, there will be severe market implications of driving rates for the exchange of traffic to a near-zero level. The long-term investments of rural LECs are likely to be affected, as rural LECs may choose not to sufficiently maintain their rural networks, reducing the quality of all industry outputs. To the extent that rural LEC investment is sufficient, the other outputs of rural LECs will have to bear the full fixed costs of those investments. Also, other distortions are certainly possible - if not probable - when untested regulation is adopted. As a recent example, the severe turmoil in the financial markets provides an excellent illustration of the potential consequences of hasty adoption of untested changes to regulation.

The Nebraska Companies believe that driving rates for the exchange of traffic to a near-zero level will cause undesirable behavior of other market players; namely, the abuse of the rural networks and the failure of other carriers that use those networks to make economic-based decisions. Carriers terminating any type of traffic onto rural networks will have no reason to constrain their traffic when rates are far below costs at near-zero levels. The Nebraska Companies know of no analysis that has been done by the Commission to quantify the likely substitution from services priced on a non-usage-sensitive basis to services priced on a per-minute of use basis. With the latter priced at a near-zero rate level, market participants will alter their behavior and terminate more traffic using services priced at the near-zero per-minute of use rate level.

The Commission's adoption of such a drastic and non-cost-based intercarrier compensation reform plan and corresponding pricing standard without first conducting a complete cost-benefit analysis evaluating the potential impact of a shift from the current TELRIC Plus cost standard to the Chairman's proposed standard would be imprudent. The proposed standard fails to quantify the alleged benefits of adopting the proposed standard and does not provide any information on the new pricing standard's economic costs. Before adopting any new pricing standard beyond what exists today, the Commission should conduct a comprehensive cost-benefit analysis that would take into account the full economic costs, benefits and results of implementing such a plan.

Considering the current economic climate and the expedited comment cycle in this proceeding, the Commission must thoroughly scrutinize any new proposed pricing standard and weigh the impact of the pricing standard to all industry segments, and particularly on rural carriers. Since the new pricing standard has not been appropriately vetted and there is no overriding rationale to make a significant change in the pricing standard at this time, no change should be adopted. In fact, the Nebraska Companies urge the Commission to reject Chairman Martin's pricing plan for the welfare of all telecommunications consumers.

III. Neither Section 252(d) of the Act nor Economic Theory Support a Pricing Regime that Establishes A Single, Statewide Terminating Rate for All Section 251(b)(5) Traffic

The Nebraska Companies submit that neither Section 252(d) of the Act nor economic theory support a pricing regime that establishes a single, statewide terminating rate for all Section 251(b)(5) traffic. Specifically, Section 252(d)(2) establishes rates for transport and termination of traffic terminating on an incumbent LEC's network. Pursuant to Section 252(d)(2), these rates are based on the unique and specific network costs of the terminating incumbent LEC.

The current system of carrier-specific rates for intercarrier compensation is an efficient way to address cost disparities. Differentiated rates between carriers for intercarrier compensation are efficient because these rates require the allocation of resources according to the costs associated with conducting business in different geographic regions.

While referring to how market forces should establish the economically efficient price for access,[8] the Chairman proposes a uniform terminating price for an entire statewide market regardless of where carriers operate. Setting prices is not a characteristic of a market-based economy. The laws of supply and demand for the entire market should be used to determine the equilibrium price of any service. When determined by the rules of the market, the prices of many goods and services - for example, food, power, housing, wages, and many others - vary regionally to reflect variations in cost. The price of interconnection (access and reciprocal compensation) should not be any different.

Published economic research is supportive of the current TELRIC Plus cost standard. Industry experts Gabel and Rosenbaum find that "[a]nother advantage of TELRIC pricing is that it encourages efficient use of resources. TELRIC pricing allows efficient entry because competitors can obtain access to the network at a price that reflects the cost to society of making the resources available."[9]

The Nebraska Companies submit that the current TELRIC Plus standard should remain the standard of rate development for 251(b)(5) traffic and such standard must be applied on a company-specific basis. The Commission must not adopt the Chairman's unsupported and untested pricing method for 251(b)(5) traffic.

IV. The Courts Have Determined that the Commission's Authority Under Section 252(d) of the Act is Limited to the Prescription of a Pricing Mechanism and Does Not Extend to Constraining Input Parameters in Determining the Ultimate Price

In examining the plain and unambiguous language contained in Section 252(d), it is evident that Congress intended to preserve state commissions' rate-making authority over

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[8] *See* Appendix A, Para. 242; Appendix C, Para. 237.

[9] Gabel, David; Rosenbaum, David: Who is Taking Whom: Some Evidence on the Constitutionality of TELRIC. *Federal Communications Law Journal*, March 1, 2000. pp. 239-269TELRIC. *Federal Communications Law Journal*, March 1, 2000, pp. 239-269.

intrastate matters. Moreover, in regard to the pricing standards, the plain language of Section 252(d) fails to give the Commission any authority to establish the input parameters of a carriers' network for purposes of setting rates. Allowing the Chairman or the Commission to designate the input parameters in order to engineer a desired rate output is tantamount to rate-setting, which the Supreme Court has previously determined is not the Commission's role.

In *Louisiana Public Service Commission v. FCC*, the Supreme Court concluded that Section 152(b) of the Act provides state commissions with exclusive jurisdiction over intrastate rates and services, asserting "nothing in this chapter shall be construed to apply or give the Commission jurisdiction with respect to (1) charges, classifications, practices, facilities, or regulations for or in connection with intrastate communications service" and "[b]y its terms this section fences off from the FCC reach or regulation intrastate matters-indeed, including matters 'in connection with' intrastate service."[10] More recently, in *AT&T Corp. v. Iowa Utilities Board*, the Supreme Court held that while the Commission has authority to design and implement pricing standards and implement the methodologies, it is the state commissions that have the authority to apply the pricing standards and implement the methodologies to determine and set the actual rates.[11]

The Commission should not dictate input parameters that constrain the state commissions' capacity to exercise their rate-setting rights as guaranteed by Sections 152(b), 251 and 252 and the Supreme Court. In designating the input parameters in the Commission's proposed "pricing mechanism," the Chairman is attempting to circumvent the Commission's rate-setting limitations regarding intrastate matters. If the Commission is allowed to specify the precise factors to be taken into account for its "pricing mechanism," it will select only the factors

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[10] *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 370 (1986).
[11] *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 385 (1999).

which have the effect of producing rates in the range of the original targeted rate (*i.e.* \$0.0007 per minute). To evidence the existence of the Chairman's attempt to set rates at a near-zero level, one need not look any further than the following statement as contained in Paragraph 202 of Appendix A and Paragraph 197 of Appendix C: "[w]e expect that state commissions, applying the new 'additional costs' standard adopted in this order, will set final reciprocal compensation rates at or below \$0.0007 per minute of use." Consequently, in utilizing a mechanism in which the inputs are selected for the purpose of manipulating and manufacturing a predetermined rate outcome, state commissions will lose the ability to actually set rates. Therefore, the Commission's action in constraining the input parameters in its "pricing mechanism" is tantamount to rate-setting and for that reason, exceeds the Commission's authority.

V. No Justification has Been Provided for Applying Section 251(b)(5) Reciprocal Compensation Financial Responsibilities To 251(g) Interexchange Traffic

Appendices A and C to the FNPRM inexplicably would require that all traffic, including existing access traffic, would have to be exchanged under the intercarrier compensation regime. Placing the 251(g) access services into the realm of the reciprocal compensation framework of 251(b)(5) is incompatible given long distance carriers continue to require access to customers that are not physically connected to their network.

As explained in the *First Report and Order*,[12] reciprocal compensation for the transport and termination of calls was intended for a situation in which two carriers collaborate to complete a local call. The local caller pays charges to the originating carrier, and the originating carrier compensates the terminating carrier for completing the call. The reciprocal compensation structure established in Section 251(b)(5) does not accommodate the interconnection of long distance carriers in either the originating or terminating portion of a call for the purpose of

[12] *See First Report and Order*, Para. 1034.

providing long distance service because the purpose of Section 251(b)(5) is to compensate local carriers for terminating local traffic from a competing local carrier. In order to provide long-distance service, an interexchange carrier may access multiple LEC networks through various points of interconnection and specific meet-point billing arrangements in order to gain access to their long distance customers to which they have no actual physical network connection.

Neither Appendix A nor C attempts to answer how the reciprocal compensation framework of Section 251(b)(5) - which includes only transport and termination constructs for terminating traffic that originates in the same local exchange area or Major Trading Area for CMRS carriers[13] - accommodates the IXC/LEC interconnection needs that are effectuated in the access rules. Such lack of explanation is an obvious deficiency that cannot be allowed to go forward.

VI. The Proposal To Use a Uniform Traffic Exchange Regime When the Network Structures of the Interconnecting Carrier are Not Uniform is Flawed

Within the Proposed Orders, an attempt is made to legally justify expanding the reach of Section 251(b)(5) beyond the intent of the Act. The Proposed Orders' stated rationale to expand the scope of Section 251(b)(5) is "[h]ad Congress intended to preclude the Commission from bringing certain types of telecommunications traffic within the Section 251(b)(5) framework, it could have easily done so by incorporating restrictive terms in Section 251(b)(5). Because Congress used the term 'telecommunications,' the broadest of the statute's defined terms, we conclude that Section 251(b)(5) is not limited only to the transport and termination of certain types of telecommunications traffic, such as local traffic." (*See,* Appendix A, Para. 218; *See* Appendix C, Para. 213) Neither Proposed Order explains why or how incorporating the Section 251(g) access regime within the framework of Section 251(b)(5) is legally or logically correct.

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[13] 47 C.F.R. § 51.701.

The Commission recognized, in its *First Report and Order*, that Section 251(b)(5), together with 251(c)(2), requires incumbent LECs to enter into agreements with new entrants that had constructed their own local exchange facilities for the transport and termination of traffic originating on the other local carrier's network under a reciprocal compensation arrangement, and thereby, enabling the entrant's subscribers to place and receive calls from the incumbent LEC's subscribers.[14] Interexchange carriers, which have not constructed their own local exchange facilities and do not have their own local subscribers, have no basis to enter into reciprocal compensation arrangements to enable their subscribers (since they have no local subscribers) to place and receive calls from the incumbent LECs' subscribers.[15] Similarly, there is no rationale for the establishment of a reciprocal arrangement pursuant to Section 251(b)(5) between an incumbent LEC and a CMRS carrier when a CMRS carrier provides service to their subscribers located outside the MTA in which calls originate from or terminate to the incumbent LECs' subscribers as these CMRS subscribers are not "local" subscribers.

VII. There are Issues in Determining Which Carrier is Responsible for Payment if the Reciprocal Compensation Regime is Applied to All Terminating Traffic after Year Two as Suggested by the Proposed Orders

Three years from the effective date of the Proposed Orders, the Commission would require that all LECs reduce their Section 251(b)(5) based terminating access rates for all traffic by 50 percent of the difference between their current terminating rate and the interim, uniform

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[14] *See First Report and Order*, Para. 13.

[15] The Commission gave a similar rationale in Paragraph 191 of the *First Report and Order* regarding interconnection. There the Commission found that an IXC that requests interconnection solely for the purpose of originating or terminating its interexchange traffic it is not entitled to receive interconnection pursuant to Section 251(c)(2) since this offering does not fall within the scope of the phrase exchange access. The Commission found that only when a traditional IXC offered access services in competition with the incumbent LEC would the IXC be eligible to obtain interconnection pursuant to Section 251(c).

reciprocal compensation rate established by the state commissions. Absent from the Proposed Orders discussion is any description of the carrier to which the rate would apply, specifically when traffic is originated and terminated by an IXC. As noted in the *First Report and Order*, access charges were developed to address a situation in which three carriers - typically, the originating LEC, the IXC, and the terminating LEC - collaborate to complete a long distance call. Reciprocal compensation for transport and termination of calls was intended for a situation in which two carriers collaborate to complete a local call. The local caller pays charges to the originating carrier, and the originating carrier compensates the terminating carrier for completing the call. In transitioning terminating access traffic to a reciprocal compensation regime, the Commission, if Appendices A and C were adopted as currently written, does not establish which carrier is responsible for the payment of compensation. The IXCs and CMRS carriers, in the case of interMTA traffic, will point to the originating LEC and the originating LEC will point to the IXC, as the carrier responsible for paying the terminating LEC "reciprocal compensation" on long distance calls. In order to prevent this outcome, any final action by the Commission on this subject must specify which carrier in the call stream is responsible for the payment of terminating compensation in such instances.

Moreover, reciprocal compensation was intended for a situation in which two carriers collaborate to complete a local call. Any transition to incorporate terminating access traffic into the reciprocal compensation regime must include traffic exchange specifications in the rules which define the network locations on the ILEC network required of the terminating carrier for traffic exchange.

VIII. The Default Edge Rules to Be Adopted After Year 10 in the Proposed Orders Are Vague and Much More Description of the Plan Must be Included in the Record Before Informed Comments Can Be Provided

According to the Proposed Orders, following the transition, once carriers are charging the final, uniform reciprocal compensation rate, the Commission will establish AT&T/Verizon's default rules regarding the network "edge."[16] Further, according to the Proposed Orders, these default rules would not require changes to physical points of interconnection, but would simply define functions governed by a uniform, terminating rate. This proposal, however, leaves many questions without answers:

(1) How does reciprocity work for calls involving an IXC? The IXC gains access to the LEC network to terminate calls to the LEC end-users. What does the originating LEC gain access to?

(2) How does the proposed plan distinguish between costs that are associated with transport and costs that are associated with termination? There are different network component costs if the "edge" is determined to be at an end office versus if the edge is determined to be at a point of presence.

(3) What is the maximum number of edge locations? What is the scope of the LEC market? The Proposed Orders, which state that reciprocal compensation will apply from the called service provider network edge to the called party, does not specify the number of edge locations in a LEC's market or network or the scope of the market (LEC rate centers, LATAs, the state).

(4) What locations can serve as edges? The Proposed Orders appear to use routing conventions to associated edges with called party telephone numbers even though certain designated edge locations such as POIs provide no access (to called party numbers) to carriers that would terminate their traffic to such edge locations. To remedy this deficiency for rural LECs, should the proposal define its edge as the end office that serves the end user?

(5) According to the Proposed Orders, for every call, the calling party service provider (e.g., the calling party's LEC for a local call or the calling party's IXC for a long distance call) is responsible for the transmission and routing of the call to the network edge of the called party service provider. For terminating carriers, that has a nation-wide network that includes LEC, IXC, and CMRS operations,

[16] *See* Letter from Hank Hultquist, AT&T Services, Inc., and Donna Epps, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 at 1–2 (filed Oct. 14, 2008) (AT&T and Verizon Oct. 14, 2008 *Ex Parte* Letter) (providing seven default rules).

should it not be logically concluded that its network edge is the closest end office, MSC, or point of presence to that of the calling party's service provider?

Given the lack of specificity in the Proposed Orders' "Edge Plan," such Plan must not be adopted until further details are provided and all interested parties have had a reasonable opportunity to review and comment.

IX. The Proposed Orders Defer the Final Resolution of Critical Issues Related to Originating Access and Transit Traffic to Further Notice

In the FNPRM, the Commission also sought comment on certain additional issues not resolved in the accompanying Proposed Orders.[17] The first issue is originating access. In the Proposed Orders, the Commission concludes that retention of originating access charges would be inconsistent with the newly proposed regulatory approach to intercarrier compensation. Accordingly, the findings in the Proposed Orders conclude that originating charges for all telecommunications traffic subject to the comprehensive intercarrier compensation framework must be eliminated by the conclusion of the transition to the new regime.

The Proposed Orders offer no foundation for a conclusion that originating access would be inconsistent with a new regulatory approach to intercarrier compensation. Additionally, this assertion ignores the fact that traditional long distance carriers continue to utilize LEC networks to originate traffic from a customer physically connected to and using that LEC network. These IXCs need a framework to do so under the dialing parity requirements established pursuant to Section 251(b)(3). A wholesale service framework should not be circumscribed under Section 251(b)(5). As long as IXCs require the use of LEC networks for the origination of their traffic, a separate compensation regime must be maintained. If IXC origination is not to continue, it must

[17] *See* Appendix A, Para. 345-349; *See* Appendix C, Para. 342-346.

be reconciled how interconnection will occur and how compensation for this displaced originating traffic is to occur.

The Commission also sought comment on the issue of transit traffic. According to the Proposed Orders, transiting occurs when two carriers that are not directly interconnected exchange traffic by routing the traffic through an intermediary carrier's network.[18] The Commission requests comment on whether the reforms it adopts necessitate the adoption of any rules or guidelines governing transit service.

The Proposed Orders leave unanswered the critical question of the role of transit service in the proposed Section 251(b)(5) regime. The Nebraska Companies submit that the Commission must adopt rules governing transit service that address the following:

(1) Should a transit service provider have a default edge?

(2) Under what circumstances are long distance carriers considered to be operating as transit providers?

(3) Is a transit carrier considered to be an "underlying carrier"?

(4) Do transit carriers have duties and obligations under the law? And if so, what part of the law?

In order to clarify the role of transit service within the Commission's proposed Section 251(b)(5) regime, the Commission should address the questions proffered by the Nebraska Companies. Providing answers to these questions is essential for the Commission's adoption of rules for the provisioning of transit services.

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[18] *Intercarrier Compensation FNPRM*, 20 FCC Rcd at 4737–38, Para. 120. Typically, the intermediary carrier is an incumbent LEC and the transited traffic is routed from the originating carrier through the incumbent LEC's tandem switch to the terminating carrier. The intermediary (transiting) carrier then charges a fee for use of its facilities.

X. Unification of Rates Does Not Require the Unification of Compensation Regimes

The Nebraska Companies encourage the Commission to fully analyze the effects of reducing the intrastate access rates to interstate levels prior to potentially taking the additional step of reducing access rates to a level based upon the "additional cost" pricing standard of Section 252(d). The Nebraska Companies believe that reducing state access rates to interstate levels will significantly reduce the incentives and opportunities for arbitrage given that the largest disparity in rates will have been eliminated.[19]

Consequently, prior to any Commission decision to move access rates to a level based on another standard such as TELRIC, the Commission should first analyze the effect on new universal service support that will be required to unify access charges, and later also analyze and determine whether proper funding is available to unify all intercarrier compensation rates.

XI. The Classification of the Exchange of Traffic between IP and PSTN-Based Network as an Information Service is Improper and Adversely Impacts the Intercarrier Compensation System

The Proposed Orders classify as information services those services that originate calls on IP networks and terminate on circuit-switched networks or conversely originate on circuit-switched networks and terminate on IP networks (collectively "IP/PSTN services").[20] The particular nature of the definition of IP/PSTN services appears to include both ISP-bound traffic and all forms of VoIP traffic that touches the PSTN, including interconnected VoIP. The Proposed Orders go on to utilize this service classification action to preempt state authority over

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[19] In the Joint Statement that accompanied the Further Notice, Commissioners Copps, Adelstein, Taylor Tate and McDowell acknowledge there is "a tentative but growing measure of consensus" on a number of issues, including moving intrastate access rates to interstate access levels "over a reasonable period of time." The Nebraska Companies would support this measure, if it is implemented in a legal manner and with reasonable alternative cost recovery, for which the four commissioners' statement also notes a growing consensus.

[20] FNPRM, Appendix A, Para. 209-210; Appendix C, Para. 204-205.

these services and to draw conclusions about the compensation regime associated with the exchange of traffic between IP and PSTN networks.[21] The fact is that the traffic actually exchanged (at the exchange point) between the PSTN and the IP networks is always circuit-switched is important and not addressed in the Proposed Orders. The traffic exchanged at the exchange point unequivocally falls within the category of telecommunications services in that the traffic is both circuit-switched telecommunications and is provided for a fee.[22] Any protocol conversion that takes place on the IP side of the traffic exchange point should be irrelevant to intercarrier compensation for the exchange of traffic.

The policy implication of the conclusion of the Proposed Orders is both improper and immediate. That is, after an information service classification for traffic exchanged between IP and PSTN networks is approved, all interconnected carriers that would serve to gain from unclear compensation obligations associated with information services would be motivated to claim that all traffic exchanged is from an IP network. Under the Proposed Orders, the compensation regime and obligations only become clear *after* the transition.[23] A harbinger of the adverse impacts that would result from the reclassification of traffic that originates from IP networks is represented by the situation surrounding the Enhanced Service Provider ("ESP") exemption. Since 1983, the Commission has exempted ESPs from the payment of interstate access charges.[24] ESPs are companies that provide services such as NEXUS and LEXUS that are information services. Consequently, ESPs are treated as end-users for the purpose of

[21] FNPRM, Appendix A, Para. 211-229, Footnote 564, Appendix C, Para. 206-224, Footnote 555.
[22] 47 U.S.C. § 153 (51).
[23] FNPRM, Appendix A, Para. 218, Footnote 564; Appendix C, Para. 213, Footnote 555.
[24] This policy is known as the "ESP exemption." *See MTS/WATS Market Structure Order*, 97 FCC 2d at 715 (ESPs have been paying local business service rates for their interstate access); *see also,* Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket 87-215, Order, 3 FCC Rcd 2631, 2633 (1988) (*ESP Exemption Order*).

applying access charges and are, therefore, entitled to pay local business rates for their connections to LEC central offices and the PSTN.[25] However, VoIP providers (such as CommPartners) routinely claim that their traffic qualifies as enhanced service because it undergoes a protocol conversion and therefore, CommPartners claims to have no obligation to pay access charges.[26] This "exemption logic" would extend to the payment of any compensation in the "status quo" period where the obligations of providers classified as information service providers are undefined.

The new features and cost savings associated with VoIP service have only been possible by exploiting the extensive networks put in place by telecommunications service providers. Most customers assume VoIP can offer "unlimited long distance" because of advances in technology. This notion is far from the truth. Rather, VoIP providers offer lower cost services by avoiding access charges through a variety of methods including claiming ESP exemptions, the masking of traffic (phantom traffic), and manipulating "local" termination arrangements (sending the call to a point that is EAS to the called party and terminating it as a local call). Much of the "enhanced functionality" provided by VoIP services can also be accomplished through Class-5 and circuit-switched technologies.

If the exchange of traffic between VoIP providers and the PSTN is classified as an information service, the amount of traffic that would be exempt from access charges or other forms of intercarrier compensation will grow immediately and the entire universal service system will be at risk. The Commission states that ". . . carriers increasingly are converting portions of

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[25] *ESP Exemption Order*, 3 FCC Rcd at 2635 n.8, 2637 n.53. *See also, Access Charge Reform Order*, 12 FCC Rcd at 16133-35.

[26] Letter from Kristopher E. Twomey, Regulatory Counsel, Comm Partners Holding Corp., to Marlene H. Dortch, FCC, CC Docket No. 01-92 (Dec. 12,2007), at 1.

their networks to IP technology."[27] Classifying IP/PSTN traffic exchange as information services is tantamount to creating a super-arbitrage incentive to accelerate any rationale transition plan. Telecommunications voice service providers, such as AT&T, Verizon and others, can be reasonably expected to reclassify, re-tariff, or reconfigure all their current PSTN Voice Service to Interconnected VoIP Service simply to avoid paying legitimate access charges and universal service contributions. The $4 billion in potential terminating access savings would be a windfall for AT&T and Verizon and could well be a death knell for many rate-of-return rural LECs, regardless of what universal service decisions may be made.

Declaring all IP/PSTN services, including VoIP, to be an information service, also has substantial implications for the process of obtaining interconnection agreements. As Free Press suggests, "[t]his change in policy has substantial implications for the ability of VoIP providers to obtain reasonable interconnection arrangements with other carriers. This move would likely increase the level of uncertainty in the access charge regime precisely at a time when the Commission is seeking to provide certainty. By declaring VoIP an information service, the structure of Section 251 and the entire industrial interconnection regime is called into question. This is a very dangerous move, as there is no parallel regime under Title I to ensure competitive access." The Nebraska Companies agree.

The Commission should classify the traffic exchanges between IP and PSTN network service providers as a "telecommunications service" subject to the appropriate intercarrier compensation regime.[28] The Act defines "telecommunications services" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively

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[27] FNPRM, Appendix A, Para. 209, Footnote 529; Appendix C, Para. 204, Footnote 520.
[28] 47 U.S.C. § 153(47).

available to the public, regardless of facilities used."[29] Customers of interconnected VoIP service pay a fee for sending and receiving voice telephone calls. Interconnected VoIP service uses North American Numbering Plan (NANP) telephone numbers to enable voice calls throughout the PSTN and the IP platform. Therefore, the exchange of traffic between interconnected VoIP providers and the PSTN fits the definition of telecommunications service.

The Commission should also determine that the ESP exemption was never intended to exempt IP-to-PSTN voice calls and accordingly, must require all VoIP service providers to pay the appropriate compensation depending on the end point of the call under either Section 251(g) or Section 251(b)(5).[30] Rather than innovation being stymied by making VoIP providers subject to access charges, such a decision would go a long way to establish certainty in funding and enable competitive carriers equal access to network resources. The robust interconnected network has stimulated innovation and has enabled consumers to benefit from the services now available through this network. Advanced service providers, including VoIP providers, only exist because there is a network in place. By putting the network's future funding in jeopardy, everyone loses. The Commission needs to rethink its policy regarding classification of VoIP as an information service and exempting it from access charges so that telecommunications consumers may continue to enjoy the benefits that the interconnected network has provided.

XII. Conclusion

The Nebraska Companies urge the Commission to reject the Proposed Orders and instead, recommend the following actions:

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[29] 47 U.S.C. § 153(46).

[30] *See* NECA Comments *In the Matter of Petition of the Embarq Local Operating Companies for Limited Forbearance Under 47 U.S.C. Section 160(c) from Enforcement of Rule 69.4(a), 47 U.S.C. Section 251(b), and Commission Orders on the ESP Exemption,* WC Docket NO. 08-08, Filed February 19, 2008.

1. The Commission should retain the existing TELRIC Plus standard in accordance with Section 252(d) of the Act to set a single rate per operating company.

2. The Commission should not designate the input parameters in order to predetermine the reciprocal compensation rate outcome.

3. The Commission should not place Section 251(g) access service into the realm of the reciprocal compensation framework of Section 251(b)(5) as long as there are long distance carriers that need access to local exchange carriers' networks to provide long distance services.

4. The Commission should not place Section 251(g) access service into the realm of the reciprocal compensation framework of Section 251(b)(5) as it complicates carriers' financial responsibilities.

5. The Commission should seek further comment on the AT&T and Verizon "Edge Plan" given the lack of specificity provided in the Proposed Orders.

6. Prior to taking any further actions on access rate reduction, the Commission should determine whether reduction of intrastate access levels to interstate access levels reduced or eliminated arbitrage opportunities and investigate the effect of unifying terminating access rates on the universal service system.

7. The Commission should conclude that IP/PSTN traffic is a telecommunications service, as defined in the Act, and is subject to assessment of access and reciprocal compensation rates, as appropriate. Any finding to the contrary would put the entire intercarrier compensation and universal service systems at risk.

The Nebraska Companies' proposal maintains certainty and stability in the intercarrier compensation system without risking the long-term viability of universal service on which rural carriers' and their subscribers depend.

Dated: November 26, 2008.

THE NEBRASKA RURAL INDEPENDENT COMPANIES

Arlington Telephone Company,
The Blair Telephone Company,
Cambridge Telephone Company,
Clarks Telecommunications Co.,
Eastern Nebraska Telephone Company,
Great Plains Communications, Inc.,
Hartington Telecommunications Co., Inc.,
Hershey Cooperative Telephone Co.,
K. & M Telephone Company, Inc.,
The Nebraska Central Telephone Company,
Northeast Nebraska Telephone Company,
Rock County Telephone Company,
Stanton Telecom Inc., and
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